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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Interconnection and Resale)

Obligations Pertaining to)

Commercial Mobile Radio Services)

CC Docket No. 94-54

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COMMENTS OF BELL ATLANTIC NYNEX MOBILE, INC.

Bell Atlantic NYNEX Mobile, Inc., hereby comments on the Third Notice of Proposed Rulemaking in this proceeding, and opposes imposition of automatic roaming requirements on CMRS providers.

SUMMARY

The Third Notice was included in the Commission's Order adopting new Section 20.12(c) of its Rules, which obligates each cellular, broadband PCS and wide-area SMR provider to allow customers of other carriers to roam on its system. Second Report and Order and Third Notice of Proposed Rulemaking, CC Docket No. 94-54, FCC 96-284, released August 15, 1996. The Commission should have ended its consideration of roaming upon issuing the Second Report.

Instead, the Third Notice takes up whether to intrude even further into the CMRS marketplace by requiring automatic roaming among carriers. First, this action is premature, given that the Commission has no experience with the roaming rule it has just adopted -- a rule that will not even take effect until the

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end of this month.¹ Second, an automatic roaming rule cannot be justified under the Commission's standard for imposing new CMRS regulation, because there is no market failure that could provide a basis, let alone the requisite compelling need, for regulation. To the contrary, the mobile services market is rapidly expanding both in the number of customers and the number of competitors, and without any mandated automatic roaming. Third, an automatic roaming rule would distort the vigorous market competition over roaming that has already evolved, and would impair efforts to remedy the greatest problem facing CMRS providers and customers today -- fraudulent use of mobile phones. Bell Atlantic NYNEX Mobile urges the Commission to focus on how it can assist the industry and the public in attacking wireless fraud, instead of considering rules that are at best unnecessary and at worst will exacerbate that problem.

In a separate statement accompanying the Third Notice, Commissioner Chong cautioned that the Commission should merely "monitor the development of roaming in the CMRS marketplace and not intervene unless and until a problem develops." The Commissioner concluded that nothing in the present record "has convinced me that the imposition of a mandatory automatic roaming requirement is necessary at this juncture." Bell Atlantic NYNEX Mobile agrees. The instant proceeding should be terminated without adopting additional regulation.

¹New Section 20.12(c) takes effect 60 days after Federal Register publication. Second Report and Order at ¶ 43. Publication occurred August 27, 1996. 61 Fed. Reg. 43977. The rule will thus not be effective until October 26, 1996.

AN AUTOMATIC ROAMING RULE WOULD BE PREMATURE AND UNNECESSARY AND WOULD IMPAIR ANTI-FRAUD EFFORTS.

1. *The Third Notice is premature.* Despite its title, the Third Notice does not propose specific rules, but merely cites "the need to seek up-to-date information on events of the past year." (§ 16.) This sort of fact-gathering is appropriately done pursuant to a Notice of Inquiry which can then, if warranted, ultimately lead to a rulemaking. But a Notice of Proposed Rulemaking must be based on at least preliminary findings that specific rulemaking action is warranted. Here, the Third Notice concedes that it does not have the facts to make such findings.

Substantively, the Third Notice is premature because the manual roaming rule that the Second Report just adopted is not yet even in effect. It is putting the cart before the horse to embark on changing a rule before that rule takes effect and can be evaluated. After receiving extensive comments on roaming technologies and practices, the Commission chose the manual roaming rule in the belief that it was necessary to ensure customers could roam on all broadband CMRS (not just cellular) systems. Whether that rule is successful cannot be tested until the rule is in place. If roaming customers in fact can obtain service, there would be no need for a further rule.

In addition, the Third Notice ignores the premise of the Second Report that consideration of an automatic roaming rule should be deferred because the CMRS market is so rapidly changing. That change is still occurring. The A-block and B-

block PCS systems are in construction, the C-block systems are now being licensed, and the D, E and F-block systems are being auctioned. The Third Notice, however, would nonetheless go ahead now. Commissioner Chong pointed out that, given changing market conditions, carriers' roaming concerns were "speculative," and stated, "We should avoid unnecessary regulations unless an identifiable problem has developed."

Mandatory automatic roaming would also be seriously premature because of technical incompatibilities among CMRS networks. This situation is a product of the Commission's decision to allow carriers to deploy alternative PCS technologies on the premise that flexibility would encourage innovation and that compatibility would eventually develop.² The open approach has, however, initially yielded incompatible digital systems which are also in many respects incompatible with analog technology. The Second Report (at ¶ 7) thus finds that, before switches of incompatible systems can communicate, new protocol conversion standards will need to be developed. The Third Notice (at ¶ 29) decides that carriers will not be forced to enter into agreements with other carriers deploying incompatible technologies. Given these conclusions, requiring automatic roaming would be illogical for the foreseeable future.

²Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, GEN Docket No. 90-314, 8 FCC Rcd 7700, 7754 (1993)

2. An automatic roaming rule would not meet the strict standard for new CMRS regulation. The Third Notice fails to provide any reason why an automatic roaming requirement would satisfy the rigorous standard for imposing new economic rules on CMRS providers. In the First Report and Order in this docket, which adopted a resale obligation for CMRS providers, the Commission stated, "[T]he resale rule, like all regulation, necessarily implicates costs, including administrative costs, which should not be imposed unless clearly warranted."³ This requisite finding of clear need is not merely FCC policy but is the mandate of Congress. In the 1993 amendments to the Communications Act,⁴ Congress found that regulation can impair the benefits of competition, and thus required that any regulation of the CMRS industry be narrowly written to meet a compelling need.⁵ And in the 1996 Telecommunications Act, Congress again directed that markets be opened and regulatory restraints be removed except where they can be clearly justified.⁶

³Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order, CC Docket No. 94-54, FCC 96-263, released July 12, 1996, at ¶ 14 (emphasis added).

⁴Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b) (1993).

⁵In the 1993 Act, "Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need." In Re Petition of the Connecticut DPUC, Report and Order, 10 FCC Rcd 7025, 7031 (1995) (emphasis added).

⁶The 1996 Act is intended "to provide for a pro-competitive, deregulatory national policy framework." S. Conf. Rep. No. 230, 104th Cong., 2d Sess. (1996) at 1.

Adoption of an automatic roaming rule cannot meet this legal standard. There is no evidence that carriers are refusing to enter into automatic roaming agreements. To the contrary, as many commenters (Second Report at ¶ 8) and Commissioner Chong have pointed out, most cellular carriers currently have automatic roaming agreements which were arrived at wholly through market incentives rather than because of Commission interdiction. Competitive market forces induce these agreements because they facilitate using mobile phones while traveling, increase call volume, and thereby increase revenues. CMRS carriers thus have every incentive to enter into these agreements, and the presence of automatic agreements reflect those competitive incentives.

Nor is there any evidence that new CMRS entrants need automatic roaming in order to compete effectively. To the contrary, Sprint and APC have quickly achieved a major presence in the Washington-Baltimore MTA with their PCS system -- even though the Sprint/APC system does not at present offer any roaming, let alone automatic roaming. Automatic roaming is simply unnecessary for PCS competition to cellular.

The customer-focused need that this rulemaking originally identified, to ensure that customers could access a carrier while roaming, has been met by the manual roaming rule. But mandating automatic roaming agreements between carriers regulates carrier-to-carrier relationships. Before such economic regulation can be imposed, the Commission must find that there are clear benefits to such intervention and that the market will not achieve those benefits on its own. The

record identifies no such benefits, let alone the compelling ones that must be found to justify such regulation.

Whatever concerns may exist can be fully addressed by existing remedies. The Second Report (at ¶ 10) finds that roaming is a common carrier service and is thereby subject to statutory prohibitions against unreasonable or unlawfully discriminatory conduct. A CMRS carrier which believes that it has been unlawfully denied a roaming arrangement or forced to accept what it believes are unreasonably discriminatory terms may invoke the full array of remedies under Sections 201, 202, 207 and 208 of the Communications Act and the Commission's existing rules. Adding another rule would serve no purpose.

3. Mandatory Automatic Roaming Would Distort Market Competition and Impede Carriers' Efforts to Prevent Fraud. The Third Notice (at ¶ 28) and Commissioner Chong both correctly note that carriers enter into different terms and conditions in their roaming agreements in order to compete for customers by differentiating their services. Roaming agreements are part of the vigorous competition for customers that characterizes the mobile services market today. Requiring specific agreements would be harmful economic regulation because it would distort market-based decisions and prevent product differentiation.

Adopting an automatic roaming rule would also improperly thrust the Commission into overseeing the terms and conditions (including price) of contracts between carriers. Indeed ¶ 22 of the Third Notice asks multiple and complex questions as to how to regulate such contracts, such as how to determine whether

a roaming agreement is "nondiscriminatory" and what would be a "similarly situated" carrier. In other proceedings, however, the Commission has found that competitive forces in the CMRS market are sufficient to forbear from regulating intercarrier agreements.⁷ An automatic roaming rule could not be squared with the Commission's previous actions toward CMRS carriers.

An automatic roaming rule will also impair anti-fraud efforts. Wireless phone fraud is a serious public interest problem because the enormous losses that carriers are incurring affect their costs of doing business and thereby the rates that subscribers pay. The largest component of wireless fraud is roaming fraud, where a cloned phone is taken into another market and calls are made for which the home carrier must pay the foreign carrier. Carriers find that the most viable way to combat roaming fraud is to temporarily restrict automatic roaming, and instead require their customer's phone to be validated when roaming in a foreign system. In effect the industry is setting up a manual "checkpoint" to cull out unlawful mobile phones. This is burdensome and costly, but it is necessary if fraud is to be stopped.

⁷In its proceeding to implement Section 332 of the Communications Act as amended in 1993, the Commission withdrew from such economic regulation, noting the counterproductive effects of government intervention. Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd 1411 (1994). It specifically forbore from enforcing Section 211 of the Communications Act, which requires that certain inter-carrier contracts be filed. The Commission found that, given CMRS competition, "[I]t is unlikely that contracts will contain unreasonably discriminatory rates or regulations. . . . Competitive market forces will ensure that inter-carrier contracts will not be used to harm consumers." 9 FCC Rcd at 1480.

An automatic roaming requirement would undermine carriers' flexibility to attack the most prevalent type of fraud. Encryption, authentication and other subscriber verification technologies may eventually obviate the need for current anti-fraud practices such as limiting automatic roaming. Success of those technologies, however, is years away. For now, carriers must retain the ability to suspend automatic roaming agreements or decline to enter into such agreements.

CONCLUSION

For the reasons set forth herein and in the comments which have already been submitted in this proceeding, the Commission should not adopt an automatic roaming obligation. It should give force to its "general policy of allowing market forces, rather than regulation, to shape the development of wireless technologies." (Third Notice at ¶ 26.) That policy compels termination of this proceeding without further action.

Respectfully submitted,

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